SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 432

JAMES R. HOFFA, LARRY CAMPBELL, THOMAS EWING PARKS, and EWING KING, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this cause on May 2, 1967.

OPINION BELOW

The opinion of the Court of Appeals is not reported as of this date but is printed as Appendix A, *infra*.

JURISDICTION

The judgments of the Court of Appeals (Appendix B, *infra*), were entered on May 2, 1967. A timely petition for rehearing was denied on June 1, 1967. (Appendix C, *infra*). On June 15, 1967, Mr. Justice Stewart extended the time for filing of the petition for a writ of certiorari to July 31, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Are Petitioners entitled to a new trial where it was shown from the affidavits submitted by them, the records of the United States Government, and an affidavit of a government employee, that there had been secret intrusion by the Government upon the Petitioners' right to counsel in preparing their defense.

II. Are Petitioners entitled to a hearing on a motion for a new trial, where their affidavits, contradicted by the Government affidavits, showed suppression of testimony of a defense witness by the chief government witness, acting in connivance or at least with the acquiescence of United States Marshals, and where such testimony would have materially impeached the evidence of the chief government witness?

III. Whether the foregoing two constitutional questions were required to be raised before the trial court upon newly-discovered evidence and with due diligence and, if so, whether they were so raised. (This question is not relied on as a reason for granting the writ).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment, Constitution of the United States, provides in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, * * *."

Fifth Amendment, Constitution of the United States, provides in pertinent part:

> "No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *."

Sixth Amendment, Constitution of the United States, provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

STATEMENT

On May 9, 1963, petitioners were charged in a five count indictment which alleged endeavors to influence petit jurors in the trial of the case of United States v. James R. Hoffa and Commercial Carriers, Inc., which will be hereafter referred to as the Test Fleet case, and which was tried in the United States District Court for the Middle District of Tennessee, Nashville Division from October 22 to December 23, 1962. That trial ended in a hung jury.

In this trial Petitioner Hoffa was convicted on two counts of the indictment and each of the other petitioners on one count.

On March 12, 1964, Petitioner Hoffa was sentenced to a term of imprisonment of four years and a fine

of $5,000 on each count, the sentences to run consecutively, and the other petitioners were each sentenced to a term of imprisonment of three years.

This Court affirmed the judgments December 12, 1966. 385 U.S. 293.

On December 12, 1964, petitioners had filed a motion for a new trial alleging that by the intrusion of agents of the Department of Justice into the relationship between the petitioners and their counsel, they were denied their right to due process of law, to effective assistance of counsel, to protection against unreasonable searches and seizures, and their right against self-incrimination.

They further alleged that they were denied their right to effective compulsory process, and the right to due process of law, in that agents of the Department of Justice, also suppressed evidence material to their defense (D.A. 1-4).[1]

On April 26, 1965, the United States District Court for the Eastern District of Tennessee, denied the motion and denied a request for a hearing thereon (D.A. 111). The Sixth Circuit affirmed (App. A).

The following facts are set forth and grouped in the same order as the corresponding reasons for granting the writ to which they are pertinent.

I. Deprivation of Fair Trial—By Secret Government Intrusion Upon Petitioners' Right to Effective Assistance of Counsel in Preparing Their Defense.

The intrusion by the Department of Justice into the petitioners' relationship with their counsel in this case was a two-phase operation. The Federal Bureau

[1] "D.A." References are to petitioners joint appendix printed for the Court of Appeals.

of Investigation and Walter J. Sheridan, special consultant to the then Attorney General, participated in both.

(a) The Intrusion by Walter Sheridan

Z. Thomas Osborn was the attorney for Petitioner Hoffa in the Test Fleet case, and in the instant case until November 19, 1963 (D.A. 5).

In connection with his services as an attorney for Hoffa, Osborn intermittently employed one Robert Vick as a confidential investigator from October, 1962 until November 8, 1963 (D.A. 5). Vick was also a guard in the city workhouse (D.A. 47) until August, 1963, when he appealed to Sheridan for help in getting a job and he was thereafter appointed to Nashville Police Department and was assigned to the Federal Government (O. App. 192a, 214a-216a, 221a, 224a).[2]

Osborn did not know until May 26, 1964, while Osborn was on trial for obstruction of justice that Vick, while employed by him on Petitioners' behalf, was also acting as a spy for and making reports to the Department of Justice from February, 1963 until November 8, 1963. Early in November, 1964, Osborn sent a copy of the appendix in his appeal to one of the attorneys for Petitioner Hoffa. That attorney immediately called Osborn, and they conferred on November 12 and 24, and December 2, 1964 (D.A. 5).

James E. Haggerty, Sr., now deceased, trial counsel for the Petitioner Hoffa, represented in writing to

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[2] The references preceded by the letter "O" refer to the Appendix in Osborn v. U. S. Case No. 16056 in the Court of Appeals.

the Court that he had no knowledge of this intrusion by the Government into the attorney-client relationship between Petitioner Hoffa and his attorneys until November, 1964 (D.A. 3).

In performing duties assigned to him from time to time, Vick from January, 1963 was an irregular but constant visitor at Osborn's office at 218 Third Avenue, North, in Nashville, Tennessee (D.A. 6).

Osborn's office was the clearinghouse for all memoranda, motions, briefs, statements of witnesses, and other written material assembled and being assembled by Osborn and other attorneys representing co-defendants. Vick had access to this information. He could come and go freely, talking to office secretaries and associates. He had—with others—use of a small office in which memoranda and other papers were kept after copying for use as needed (D.A. 6).

Vick was present when other investigators working for Osborn dictated reports to secretaries furnished by him and had general access to the information developed by the other investigators with respect to various phases of defense planning (D.A. 6).

Vick was also present on occasions when Osborn met with the attorneys for the co-defendants for the purpose of planning of legal strategy, listing of witnesses who would be called on preliminary motions, and discussing the testimony of such witnesses (D.A. 6).

Both before and after the indictment of Petitioner Hoffa on May 9, 1963, Osborn had frequent telephonic communications with him, as well as with the attorneys for his co-defendants in which were discussed confidential matters relating to the defense (D.A. 6) and

communications between the attorneys for the other defendants and Osborn. Vick was never specifically excluded from Osborn's office while he was having such communications. Osborn trusted him to keep confidential whatever information he derived from communications he may have overheard or information which was available in Osborn's office; and also to keep confidential the information Osborn gave him as to the reasons for conducting the investigations ordered by him (D.A. 6-7).

Vick commenced work in October, 1962, in connection with a background investigation of the panel which had been summoned for the trial of the Test Fleet case (D.A. 7).

Thereafter, in January, 1963, Judge William E. Miller impaneled a grand jury for an investigation of alleged jury fixing in connection with the Test Fleet case. From the *ex parte* disclosures before Judge Miller, it was apparent to Osborn that the inquiry would be directed against Petitioner Hoffa (D.A. 7).

It was about this time that an F. B. I. agent named Hillen told Vick he would like to hear "any violations of law" (D.A. 66-67).

Vick was employed by Osborn to investigate the grand jury panel for the purpose of ascertaining whether they were qualified grand jurors, whether any of the jurors had any bias against Hoffa, and whether the panel contained a cross-section of the community. Osborn also asked Vick to conduct or take part in three or four specialized investigations (D.A. 7-8).

Vick continued his work until late in August, 1963, when Vick told Osborn that he was under pressure

from Sheridan that he do no further work for Osborn (D.A. 8).

Osborn was brought to trial on May 25, 1964, on charges of obstruction of justice based on the testimony given by Vick. Osborn learned for the first time at the conclusion of the direct examination of Vick, when certain statements were made available to him and his attorney under the Jencks Act, that Vick had been reporting to the Federal Bureau of Investigation or Sheridan, or both, as early as February, 1963, regarding Osborn's work on behalf of his client (D.A. 8).

Sheridan admitted in his testimony in Osborn's trial that he knew Vick and that he first met him sometime in July or August, 1963; that he knew that Vick was investigating for Osborn and knew that he had investigated for Osborn in the 1962 Test Fleet case (D.A. 55-56).

Sheridan told Vick that if in the course of his activities, he became aware of any information concerning any illegal activities that "I would like him to represent me." (D.A. 56).

Vick stated that his first conversation with Sheridan was in the summer of 1963, and that Sheridan said: "That if I heard of any activities—that he was not interested in any of their legal activities, but that if I heard of any illegal activities, he would appreciate it if I would give him a call." Sheridan knew that Vick knew the lawyers in the case and most of the investigators (D.A. 59-60).

The following is narrated verbatim from the affidavit of Osborn in support of the motion for a new

trial (D.A. 8-13). Interpolated in brackets are the substance of Sheridan's explanation of the notes taken from his affidavit filed as Exhibit A of the Government's second response to the motion (D.A. 84-89).

"The attached documents numbered in the upper right-hand corner (1 through 10) are copies of 'cryptic' notes said to have been made at various times by Sheridan of his interviews with Vick, which were exhibited to me by the government on May 26, 1964. References are to page numbers of the attached exhibits (D.A. 8).

[Sheridan admits the exhibit is a photostatic copy of his notes (D.A. 85).]

"Page 1 is headed at the left, 'Robt. Vick' and bears the date 8/21/63. At the top of the page and to the right, three names are written, Palmer, Tweel, and Glassman. In August of 1963, the co-defendant Tweel had discussed his case with an attorney named Archibald Palmer, practicing in New York. Palmer was the attorney who had represented Judith Coplon. He spent a couple of days in my office in Nashville, Tennessee. His appearance in the case was discussed between Mr. Tweel and me. Mr. Tweel decided not to employ him to make an appearance in the case. The name Glassman is meaningless to me. The item numbered 1 on page 1 is self-explanatory; Mr. Sheridan is making a note that Vick has worked for me (D.A. 8-9).

[Sheridan admits that he saw Vick on August 21, 1963, but denies that Vick gave him this information (D.A. 85).]

"The last name on page 1 is Tippens. Count 2 of the obstruction of justice indictment charged that one

Lawrence Medlin, aided and abetted by Mr. Hoffa, had offered juror Tippens $10,000 to vote for Mr. Hoffa's acquittal in the Test Fleet case. The words following Tippens' name may be significant. These words as I read them are: 'Approach—to get off jury.' (D.A. 9)

"These words capsule the defendant Medlin's theory of defense. I had discussed the Medlin theory of defense with Medlin's attorney, R. B. Parker, Jr. I had actually at the time of Vick's report to Sheridan taken, with Mr. Parker and Mr. Tippens' attorney present, before a court reporter, a statement from Tippens which was to be the basis of Medlin's defense. This theory of defense was that Tippens wanted to avoid service on the Test Fleet jury, (and) that he had either misrepresented or being so disposed, had misunderstood the conversation had with him by Medlin. Tippens, in Medlin's theory of the case, had reported this conversation as an 'approach' to him in order that he might get 'off the jury.' I knew at the time of this report to Sheridan by Vick, Tippens had wanted very much to be excused from service on the Test Fleet jury. My information was that he had called Medlin and asked him how he could go about getting off the jury; and that he had called the Clerk of the Court, Andrew Mizell, and asked Mizell if he could get off the jury and Mizell had told him that he would have to have some reasonable excuse; and that he next called Mizell and told Mizell that he was sick with a very bad cold and unable to come to court for jury service; and that Mizell told Tippens that he would have to present a doctor's certificate or come down and make his excuse in person, when his name was called for service; and that Tippens then called Medlin and told Medlin that he would have to go ahead and serve on the jury

since otherwise the FBI would see him as he went back and forth to work; and that Tippens told Medlin that he wanted desperately to get off the jury and indicated to Medlin that he felt if he did have to serve and ended up voting to acquit Mr. Hoffa, the people of Nashville would run him out of town, whereas if he voted to convict Mr. Hoffa, he might be killed (D.A. 9-10).

"Vick could have had access to the theory of this defense from me or others in my office. An incident that happened immediately after the statement was taken from Tippens served to focus the attention of my office on this theory of defense. The incident was an effort by Tippens to make changes in his sworn statement. When the court reporter advised him that his statement had been tape recorded by her on equipment set up in front of him at the time and that he could not change the statement Tippens then asked her who had the tape recording and she told him that I did. I, therefore, took statements from the court reporter, and I made a statement of Tippens' request to me that his statement be changed. This theory of defense was discussed with Mr. Hoffa and also with other attorneys in the case. These discussions took place, both in my conference room, and telephonically (D.A. 10).

[Sheridan says: "I wish to state that my notation 'Tippens—approach—to get off jury' (appearing at the bottom of page 1 of my notes) resulted from a discussion between me and Vick of the historical fact that Juror Tippens had been improperly approached back in October, 1962, during the trial of United States v. James R. Hoffa and Commercial Carriers, Inc. In connection with this incident Vick told me that it was

his belief that the approach was made by them, viz., persons oriented to Hoffa's defense, in order that Tippens would ultimately be excused as a juror. This was my total conversation with Mr. Vick in this regard" (D.A. 86).]

"Page 2 is dated 8/23/63 and below this bears the notation 'R. Vick' (D.A. 10).

"Names of two good friends of mine appear at the top of page 2—John Cooke, Clerk of the Senate, and Buck Loeser, Clerk of the House. Buck Loeser is an attorney and is a brother of J. Carleton Loeser, our Congressman, and whose campaign I had undertaken to manage at the time I accepted employment for the defense of Mr. James Hoffa. It may be that I had contacted one or both of these friends with respect to some matter in the defense of the Test Fleet case. I do not have any recollection of having called on either of them for any matter in connection with the obstruction of justice case (D.A. 11).

"The notations thereon seem to be descriptive of the work done by Vick with others on the various investigations conducted by them (D.A. 11).

[Sheridan does not explain these notes in his affidavit.]

"Page 3 deals with my activities on behalf of Mr. Hoffa after the Test Fleet case had been concluded and after the indictment charging violation of Section 1503 had been returned. Leo Goodwin and Hynds (C. H.) whose names appear on page 3 were not employed as investigators until after the Test Fleet case had been completed and until we began work in preparing to defend the obstruction of justice case (D.A. 11).

[Sheridan admits Vick gave these names to him in identifying other investigators employed by Osborn (D.A. 86-87).]

"Page 4 is headed, 'Vick, 9/5.' This first entry on the sheet is C. W. A. on the left and 'Doris Brent started-stopped' on the right. The reference to 'Doris Brent started-stopped' is to an investigator who worked very briefly with Vick, Tolliver and Ramsey at the commencement of the investigation for the Test Fleet case (D.A. 11).

[Sheridan admits Vick told him Brent had started work for Osborn as an investigator and then stopped (D.A. 87).]

"The reference on page 4 to C. W. A., Robert Pedigo, office manager, 1925 K Street, N.W., re Vestal check, relates to work being done for Mr. Hoffa's defense in the obstruction of justice case (D.A. 11).

"Because of a number of reports respecting activities by Don Vestal, former president of Teamsters Local 327 (re-elected president in January, 1964), I decided that we had better check him out pretty carefully. I had rumors that Mr. Vestal was working for the Steelworkers Union and perhaps also for the Communication Workers of America, and I asked Vick to make an investigation of Vestal for me. I suggested that Vestal might show up as a suprise witness and I was interested in any information Vick could obtain about Vestal's present activities. Vick reported on his investigation in due course and gave me the names of certain people located in Washington, D. C., who might be able to give us further information respecting Vestal if there was any way to get the Washington people to cooperate with us.

"Vick made his report late in August, 1963, and stated to me that Don Vestal had definitely worked for the Communications Workers of America (D.A. 11-12).

[Sheridan says, "This notation resulted from my conversation with Vick in which he told me that he had been investigating the possibility that Don Vestal had been receiving sums of money from the Communication Workers of America, and that the plan was to contact a Mr. Robert Pedigo, who was connected with the C. W. A., and pay him for whatever information was available in this regard (D.A. 87).]

"The next three entries on page 4 are the names of three investigators working for me on the obstruction of justice case and not during the Test Fleet case. The names are C. H. Hynds, James Sisco and Leo Goodwin (D.A. 12).

[Sheridan admits these names and others were given to him by Vick as persons who were working for Osborn, directed toward a background check of the grand jurors (D.A. 87).]

"The next item on page 4 is 'Mizell and Earl Beasley voting records.' The notation continues, 'Williamson County Election Commission' and concludes '$15 receipt.' This is a disclosure by Vick to Sheridan of an investigation I had made in preparation for a challenge to the array of petit jurors in the obstruction of justice case. Mr. Mizell, Clerk of the District Court, was thought to be a Democrat. Mr. Howard Climer of Wilson County, the Jury Commissioner, is also a Democrat. If we could have established that Mizell was in fact a Democrat, we would have been able to show that the jury was improperly drawn and impaneled because of the violation of the Federal statute

requiring the clerk and the jury commissioner to be members of opposite political parties. I had Vick and possibly Ramsey go to Williamson County where Mr. Mizell resides and check whether Mizell had voted regularly in the Democratic primaries. I also had them check on Earl Beasley's voting record because Mizell had been reported to me as a member of Earl Beasley's political faction (D.A. 12-13).

[Sheridan says: "I wish to state that this and the related notations (appearing on page 4 of my notes) resulted from my conversation with Mr. Vick in which he told me that he had conducted an investigation of Andrew Mizell, the then United States District Court Clerk, to determine his actual party affiliation. Mr. Vick further told me that it was his understanding that the defense wanted this information in connection with the pre-trial motions which had already been argued and decided prior to my first meeting with Mr. Vick" (D.A. 87-88).]

No such motion had been filed, argued or decided prior to Sheridan's first meeting with Vick on August 21, 1963, nor has any such motion ever been filed.

"Marion Warren, now deceased, mentioned on page 5, was a lifelong friend of mine, having indeed been a deputy marshal when I had served as Assistant United States Attorney 20 years before. I had, after the Test Fleet case was completed, and the new investigations commenced, talked to Marion Warren as to whether he might help me break the question of the existence of wiretaps or surveillance. He had talked with some of his friends still working in the United States marshal's office in a fruitless effort to see whether he could get any information for me about this. Vick

may have met Warren in my office, heard me talk with him on the phone, or otherwise have picked up Warren's name. It is possible, of course, that Vick himself had gone to Warren in connection with a grand jury panel investigation in which we sought to get information as to the race, religion and employment of prospective grand jurors. (D.A. 13).

[Sheridan says, with reference to this, "My notation of the name 'Marion Warren' along with other names, I wish to state that this notation resulted from my conversation with Mr. Vick in which he told me that these people were Mr. Osborn's contacts used in developing information about people living in the geographical areas with which they were associated" (D.A. 87-88).]

"The item on page 5, 'Columbia, Fred and Vick' is a report by Vick to Sheridan of an investigation made in connection with the foreman of the grand jury which returned the obstruction of justice indictment for use in pretrial motions respecting misconduct of the prosecution (D.A. 13).

[Sheridan says the reference "to my notation 'Columbia, Fred and Vick, etc.' (page 5 of my notes), I wish to state that this notation resulted from my conversation with Mr. Vick in which he told me that Mr. Osborn and some of those working with him were anxious to develop any kind of information which would put them in a position of being able to embarrass Richard Palmer, the foreman of the grand jury investigating the various attempts to obstruct justice during the trial of United States v. James R. Hoffa and Commercial Carriers, Inc., Mr. Vick told me that he embarked on this investigation at the direction of Mr. Osborn at a time when Mr. Palmer's grand jury had

not yet voted any indictments and furthermore, that Vick and those working with him had been very anxious to make contact with an individual in Columbia, Tennessee, associated with a produce firm who supposedly had information, the knowledge of which could 'make Palmer jump through a hoop' " (D.A. 88-89).

The Government filed no affidavit by Vick setting forth his version of his conversations with Sheridan.

(b) The Intrusion by Agents of the Federal Bureau of Investigation

The grand jury which indicted the petitioners convened on the 17th day of January, 1963. The indictment was returned on May 9, 1963.

Early in 1963, Vick was approached by the Federal Bureau of Investigation agent, Henderson Hillen, who told him that "he would like to hear any violations of the law." Vick has also said under oath that he may have made reports to other persons besides Hillen (D.A. 66-67).

Vick's reports to the F. B. I. were delivered to Osborn and his attorney, as Jencks Act Statements on May 26, 1964, by Government attorneys during Osborn's trial. They are FBI official reports and are attached to the affidavit of Osborn (D.A. 47-54).

On February 23, 1963, Vick advised a special agent in the Federal Bureau of Investigation, in confidence, that one Ramsey had asked Vick if he would like to assist in another investigation for Osborn; that Vick declined at that time and Ramsey did not furnish him with any details of the contemplated investigation (D.A. 47-48). Ramsey was another investigator employed by Osborn (D.A. 47).

On the following day, February 24, 1963, Vick advised the FBI that Ramsey had visited him personally the previous night and requested Vick to assist him in the investigation. Ramsey told him that Osborn and one High wanted them to check into the background of Mr. Palmer, foreman of the Federal grand jury then sitting in Nashville, to hear evidence of alleged attempts of certain individuals to improperly contact jurors in the Test Fleet trial. Vick was unsure what this meant except that Ramsey had told him that Palmer had threatened to indict 12 witnesses who had testified if they did not furnish complete testimony (D.A. 48). High was an attorney assisting Osborn (D.A. 46).

Vick further reported that he planned to participate in the investigation, that he would go to Osborn's office and be briefed and then he would proceed with the investigation (D.A. 48).

On February 25, 1963, Vick reported to the FBI that he and Ramsey were to conduct a full background check on the Federal grand jury foreman Palmer. He then narrated in detail everything that he said he had done in connection with this investigation (D.A. 48-52).

And quoting from the report, Vick also stated: "That since Palmer has reportedly threatened a number of witnesses with indictments if they refuse to testify, that his testimony would be sufficient to quash any indictment returned" (D.A. 51).

On June 4, 1963, Vick again telephonically contacted the Federal Bureau of Investigation and volunteered that attorney Osborn had contacted him and requested him to work on the case for him. Vick advised the

FBI he planned to work for Osborn on the case and also to make any information he might obtain available to the FBI (D.A. 52-53). This FBI report was sent to Sheridan (D.A. 53).

Again on June 14, 1963, Vick contacted Special Agent Hillen at the Nashville FBI and told him that he had been working all the previous week for Mr. Osborn; Vick indicated that he wished to cooperate with the Government and make any information that he might learn available. There was no rejection of this offer. The FBI agent knew that Vick was in the employ of Petitioner Hoffa. Vick was told by the agent "that the FBI would not solicit information from him or direct his activities in the area in any manner."

Vick also proposed "an arrangement" with the Government where he would be protected from prosecution in return for furnishing information. He was informed then that he was under no "arrangement" with the FBI and that no such arrangement would be made with him by the FBI, and that whatever action he took with regard to his desire to work for Osborn would necessarily be his own decision and volition (D.A. 54-55).

At this point, Vick had already been reporting to the FBI since February 23, 1963 (D.A. 47-52). Vick then stated that in view of this, he would not volunteer any further information, that this would be the last time he would make the above offer. A copy of this FBI report dated June 21, 1963, was also sent to Sheridan (D.A. 51-55).

Vick in his sworn testimony in the Osborn trial admitted that he was employed by Osborn in October, 1962, and that he was re-employed by him to investi-

gate the grand jury that returned the indictments in this case. He continued on with the employment until after the indictments were returned (D.A. 58).

Vick at first denied being an informer for the Government before July, 1963. Upon cross-examination, Vick stated that the FBI had talked with him several times; they had first come to his home and talked to him a long time ago; in the early part of 1963, he told an FBI agent about a trip that Ramsey and he had made to Columbia in connection with the grand jury investigation (D.A. 60-63).

He admitted that he made the report to the FBI on June 14, 1963 (D.A. 63-64), the report of February 24, 1963 (D.A. 65), and the report dated June 4, 1963 (D.A. 68); and he may have made the report of February 26, 1963 (D.A. 66-67).

He also admitted that he may have made reports to other persons besides Hillen (D.A. 66-67).

On two occasions in the petitioners' trial, defense counsel sought to discover whether anyone else was working with Edward Grady Partin, a Government informer, who testified against petitioners, but were prevented by the court's sustaining Government objections (XApp. 1223a).[3]

Upon cross-examination of Sheridan, he was asked whether he had "any other such informant as Partin working for you?" The court sustained a Government objection (XApp. 1306a).

The trial court ruled that there was lack of diligence on petitioners' part; and that because there was no

[3] "XApp." references are to petitioners' joint appendix filed in the Sixth Circuit in the main jury tampering case.

interference with petitioners' counsel during the actual trial any taint of interference with effective assistance of counsel was removed. The Court of Appeals agreed (App. A).

II. Deprivation of Fair Trial—Because of the Suppression of the Testimony of a Vital Defense Witness by a Government Witness Acting in Connivance With, or at Least the Acquiescence of, United States Marshals.

When Partin was unveiled as a surprise witness, petitioners' counsel were immediately confronted with the necessity of instantaneously doing an investigation of Partin's background and activities, as well as his whereabouts during the period, to wit, the early part of October, 1962, to the 23rd of December, 1962. Counsel William E. Bufalino, endeavered to obtain interviews with various associates of Partin in Louisiana, including one Earl Jones (D.A. 16-17).

Because of his inability to locate witnesses through ordinary channels and because of their refusal to talk with him, Bufalino caused subpoenas to be issued to several persons including one Sidney Simpson.

He had further information that in the period of approximately three years prior to this trial and particularly in October, November, December, 1962, during which time the events occurred which were the subject of the indictment, Partin was a user of narcotics (D.A. 17-18).

Simpson appeared in the Clerk's office in the U.S. District Court accompanied by one Emmett Tucker. Bufalino attempted to interview him with respect to the matters set forth above but he refused to talk to him.

Bufalino was first able to obtain information from Simpson on or about September 2, 1964. Subsequent

interviews were made as late as December 1, 1964 (D.A. 18-19).

Simpson had known Partin for seven years. During the course of the trial Partin told him that he was going to be subpoenaed as a witness and to stay hidden. After Partin testified in the trial, Simpson was served with a subpoena. He told Donice Bennett, an associate of Partin, he had been subpoenaed. Thereafter he received a telephone call from Partin. Partin said to him, "I told you to stay hidden and you wouldn't have been subpoenaed." Partin gave him the name and telephone number of an attorney to get in touch with when he got to Chattanooga (D.A. 20).

Upon his arrival in Chattanooga, Simpson went to Partin's room, where Partin introduced two men to him as Federal marshals. Later a third person came into the room who was identified to him as a marshal and that man told Partin that Earl Jones and John Burch were going to be subpoenaed. Partin said, "I'll fix that." Partin got on the phone immediately and called Local 5 in Baton Rouge. In the presence of marshals he told whoever he talked to to tell Jones and Burch to "get hid," that they were going to get subpoenaed (D.A. 21).

On the morning after Simpson arrived in Chattanooga he was in Partin's room in the Drake Motel. Present were Partin, Emmett Tucker, an associate of Partin, and two deputy marshals. Partin instructed him to talk to no one. He also instructed Tucker not to permit him to talk to anyone. Later, in the Court Clerk's office, Bufalino unsuccessfully attempted to interview him. Tucker then said, "All you have to do

is tell them you are here with reference to the subpoena." Bufalino asked Tucker if he was Simpson's attorney, and Tucker said, "No, I'm a friend of his" (D.A. 21).

Simpson knew that Partin had been addicted to narcotics from some time around 1960 until the latter part of 1963. His intimate relationship with Partin continued from 1959 through the Chattanooga trial in 1964 (D.A. 21-22).

Simpson had no actual knowledge of Partin's use of dope until 1961 (D.A. 22).

In 1961, Partin shot himself while in an apartment on Nickerson Drive in Baton Rouge, Louisiana. Thereafter, Simpson learned that Partin had been taken to Our Lady of the Lake Hospital in Baton Rouge. Simpson visited Partin, who asked him to go and get the dope out of the apartment. It was strapped under a table, two needles and two bottles. One of the bottles was half full of liquid. Simpson threw the bottles in the lake at Our Lady of the Lake Hospital. He put the needles under the back seat of his mother-in-law's car, Mrs. Rena Mae Booth. He went back to the hospital the same day and told Partin what he had done with the needles and Partin told him to get rid of them. Simpson called his mother-in-law, Mrs. Booth, and told her to get rid of the needles (D.A. 22).

Rena Mae Booth did get rid of the needles (D.A. 32). After Partin left the hospital, he rented a motel room and asked Simpson to stay with him to help him in getting up and around. Partin told Simpson he was taking heroin. While Simpson was packing Partin's clothes, he saw a bottle and a hypodermic needle under some soiled clothes (D.A. 23).

From 1958 to 1961, Simpson noticed small purplish marks on both of Partin's arms running from the middle forearm up past the elbow. They were mostly on the inside of the arm in the area of the elbow joint. He never asked him about these marks until he was in the motel room with Partin in 1961, after he had come out of the hospital. Partin told him the marks were from the hypodermic needle. During this period, Partin would also break out periodically with something that looked to Simpson like a rash over his arms and chest. Simpson noticed this while they were in the motel room and asked Partin what it was. Partin replied that it was the dope coming out of him (D.A. 24).

After an operation sometime in 1962, Partin began taking his dope directly into the scars on his stomach and stopped taking it in his arms (D.A. 24).

After the operation, Simpson went to see Partin who was in a motel in Sylacauga, Alabama. Simpson was in the bathroom of the room and could hear Partin groaning. He came out of the bathroom and saw Partin lying on the bed, his eyes were open but rolled back in his head. His face and whole body were full of perspiration. On his stomach was a hypodermic needle with the needle sticking in the flesh and the chamber of the needle lying on his stomach. Simpson shoved the plunger all the way down, injecting all the fluid into a scar on Partin's stomach. In a few minutes, Partin came to and Simpson asked him what had caused him to pass out, but does not remember what explanation he gave (D.A. 24-25).

Every place Partin went, he carried with him a leather case about the size of a briefcase. In it, he always carried two needles and sometimes one bottle about two and a half inches high and sometimes two

bottles of the same size containing fluid. One of the needles had a plunger and chamber on it about five or six inches long and the other had a plunger about two or two and a half inches long. Simpson never actually saw him take dope after the occasion in Sylacauga. Partin always carried a briefcase with him as late as June or July of 1964, but Simpson did not actually see the needles or the bottles in the briefcase after late 1962 (D.A. 25).

After the instant trial, Simpson was at the union hall in Baton Rouge and he asked Partin whether he was still on the dope. Partin told Simpson that the FBI had helped him get off the dope that he was on (D.A. 26).

During the period from about March until September, 1962, Simpson was in various jails in Louisiana for a period of six months on a kidnapping charge arising out of domestic difficulties that he had had with his wife (D.A. 26).

Sometime in September, 1962 Simpson was transferred from the Donaldsonville Parish jail to the Baton Rouge Parish jail, and was placed in a cell with Partin. After about three days, Partin said, "I know a way to get out of here. They want Hoffa more than they want me." Partin told Simpson that he was going to get one of the deputies to get Bill Daniels, an officer in the State of Louisiana. A deputy, whose name is not known to Simpson, came and took Partin from the cell. Partin remained away for several hours (D.A. 26).

A few days later Partin was released from the jail. On one occasion before release, Partin returned to the cell and said, "It will take a few more days and we

will have things straightened out, but don't worry." Partin was taken in and out of the cell frequently each day. Partin told Simpson during this time that he was working with Daniels and the FBI to frame Hoffa. On one occasion he asked Partin if he knew enough about Hoffa to be of any help to Daniels and the FBI, and Partin said, "It doesn't make any difference. If I don't know it, I can fix it up" (D.A. 26-27).

While they were in the cell, Simpson asked Partin why he was doing this to Hoffa. Partin replied, "What difference does it make? I'm thinking about myself. Aren't you thinking about yourself? I don't give a damn about Hoffa.". Partin told him that the FBI and Daniels were going to get the Federal kidnapping charge against him changed to a state charge and it would be dismissed later on, and that the 26 Federal charges against Partin were going to be dropped, if he would tell the story that the FBI and Daniels told him to tell. Partin did not tell Simpson what kind of story the FBI and Daniels wanted him to tell. Partin also told Simpson that the FBI would help him on his charge in Alabama about killing the boy (D.A. 27).

Partin was being held on $50,000 bond in Louisiana. Partin told Simpson that the bond was being dropped from $50,000, to $5,000. The bond was dropped and Partin released. The kidnapping charge against Partin and Simpson was dismissed (D.A. 27).

After Simpson was released, he had a conversation with Partin, who told him that the FBI wanted Hoffa more than they wanted him and that was how he had gotten out of jail (D.A. 27).

From the time that Simpson was released from jail in September, 1962 and through December, 1962, which

was the period of the Nashville trial, Simpson had several conversations with Partin. During both the Nashville and Chattanooga trials, Partin bragged to Simpson that he was working with the Government to frame Hoffa (D.A. 28).

The Government filed affidavits of Partin and Daniels denying the allegations of the Simpson affidavit, but did not file any affidavits of U. S. Marshals denying Simpson's statement.

The Court of Appeals thought the evidence of narcotics addiction to be merely cumulative impeaching evidence because that issue had been "fully explored at the trial" (albeit without Simpson's evidence). The Court did not believe that Partin prevented Simpson from testifying at the trial and ruled that any complaint of Partin's interference should have been raised at trial. (App. A.) But petitioner did not learn of the interference until after trial.

REASONS FOR GRANTING THE WRIT

I. Deprivation of Fair Trial—By Secret Government Intrusion Upon Petitioners' Right to Effective Assistance of Counsel in Preparing Their Defense

In deciding the direct appeals from the judgments now under collateral attack, this Court assumed without deciding, that had a conviction been obtained in the Test Fleet trial such conviction would have been constitutionally defective because of the Government's intrusion upon defense right to counsel in that case. *Hoffa* v. *United States,* 385 U.S. 293.

This Court also assumed, without deciding, the *Caldwell*[4] and *Coplon*[5] cases rightly decided that Government intrusion upon the defendant's relationship with his counsel "invalidates the trial at which it occurred", but held that the facts there involved did not call for a decision on the *Caldwell* and *Coplon* rule.

There is presented for decision here the question, not decided in *Hoffa* v. *United States,* whether intrusion by the Government upon defense counsel before and after indictment, vitiates a conviction.

A few weeks after the grand jury investigation of petitioners commenced, FBI agent Hillen approached Vick whom he knew was sometimes employed as an investigator by petitioners' counsel, Osborn, and told Vick he would like to hear of "any violations of the law." At that time, Vick was a guard in the city workhouse.

In July or August of 1963, after petitioners' indictment, and while their counsel were preparing their de-

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[4] Caldwell v. United States, 205 F. 2d 879 (C.A.D.C.).

[5] Coplon v. United States, 191 F. 2d 749 (C.A.D.C.).

fense, Vick was asked by Sheridan to let him know of any "illegal activities"; and that he would like Vick "to represent" him. Sheridan knew that Vick was investigating for Petitioner Hoffa's counsel. Vick was seeking Sheridan's aid in obtaining a job. He was later appointed to the Nashville police department and assigned to the Federal Government.

Osborn's office was the clearinghouse for all memoranda, motions, briefs, statements of witnesses, and other written material assembled and being assembled by Osborn and other attorneys representing the petitioners. Vick had access to this information.

Vick was present when other investigators working for Osborn dictated reports to secretaries. Vick had general access to defense information developed by the other investigators.

Vick was also present on occasions when Osborn met with the attorneys for other petitioners to plan legal strategy, to decide on witnesses who would be called on preliminary motions, and to discuss the testimony of such witnesses.

Both before and after the indictment of petitioners on May 9, 1963, Osborn had frequent telephonic communications with Petitioner Hoffa, as well as with the attorneys for the other petitioners. They discussed confidential matters relating to the defense. Vick was not excluded from Osborn's office while he was having such communications. Osborn trusted Vick as a defense investigator, to keep confidential whatever he heard or learned in Osborn's office. Osborn also trusted him to keep confidential the information Osborn gave him as to the reasons for conducting the investigations ordered by him.

The Vick reports to the FBI, the defense work done for petitioners' counsel by Vick, and Sheridan's notes of his conversations with Vick are detailed in the Statement, pp. 5-20, *infra*. The Government filed no affidavit by Vick in explanation of his activities, or what disclosures of defense plans he made, or whether he disclosed further information to Sheridan of which Sheridan made no notes.

Neither did the Government file any affidavits of the FBI agents in explanation of their recruitment of Vick as their secret informer or what additional information Vick gave to them, if any, which they did not record.

Copies of the reports made by Vick to the FBI were submitted to Sheridan until he made direct contact with Vick in July or August of 1963.

During the trial, petitioners in their examination of Sheridan and Edward Grady Partin, (the sole witness against Petitioner Hoffa) sought to learn whether there were other secret informers in the defense councils, such as Vick. Those efforts were thwarted by successful Government objections.

Sheridan's version of the Vick disclosures of defense information and the full extent of Vick's roll have never been developed by cross-examination because of the trial court's denial of a hearing on the motion for a new trial.

However, it clearly appears from the affidavit of Osborn, and what is more important, from the records of the Department of Justice itself, including Sheridan's notes and the FBI reports that the information transmitted by Vick covered many matters connected

with the impending trial, including theories of the defense, preparations for cross-examination of a prospective Government witness, activities of defense investigators, and actions taken or planned in an effort to invalidate the indictment.

The Court of Appeals held that any taint of Government intrusion on defense counsel had been eliminated because, as it erroneously assumed, the intrusion had been exclusively on counsel who did not participate in the trial. In short, according to the Court's decision, the Government may freely violate a defendant's Sixth Amendment right to the effective assistance of counsel so long as its intrusion is before trial and upon defense counsel who do not participate in the trial.

The investigative technique of intruding on counsel by planted informer or by electronic eavesdropping is a comparatively recent development.

The Government equally intrudes upon a citizen's right to counsel whether such intrusion is accomplished by a human being or by an electronic device. The decision below is in conflict with *Black* v. *United States,* 385 U.S. 26. There a new trial was ordered where the Government had intruded upon petitioner's privacy by use of an electronic device and monitored conversations between Black and his then defense counsel, before and after Black's indictment and before trial.

Also the decision below is incompatible, if not in direct conflict with *O'Brien* v. *United States,* No. 823, Mar. 20, 1967, 35 L.Week 3329, where a new trial was ordered where it was admitted the Government had eavesdropped upon two conversations between O'Brien and his counsel after indictment and before trial.

The right of a defendant to the effective assistance of counsel of his own choosing is not confined to representation at trial.[6] The right surely covers preparation before trial (*Chandler* v. *Fretag*, 348 U.S. 3; *Hawk* v. *Olson*, 326 U.S. 271); for otherwise notice and opportunity to defend, the basic essentials of a fair hearing, are largely futile aids to a defense. "Perhaps the most crucial period of the proceedings" is between arraignment and trial "when consultations, thoroughgoing investigation and preparation [are] vitally important." *Powell* v. *Alabama*, 287 U.S. 45, 57. Effective protection of such right to counsel against Government intrusion requires invalidation of any conviction secured at trial. *Black* v. *United States; O'Brien* v. *United States, supra.* Basically the question presented for review is whether the protection of the right to counsel is coextensive with the right, or whether, as the Court of Appeals held, the protection afforded is less than the right accorded because the protection is exclusively confined to intrusion upon counsel who participate at trial.

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[6] *Reece* v. *Georgia*, 350 U.S. 85 (Grand Jury selection); *Massiah* v. *United States*, 377 U.S. 201 (Government interrogation of defendant after indictment and before trial); *Escobedo* v. *Illinois*, 378 U.S. 478 (Government interrogation of defendant after arrest and before indictment); *Blue* v. *United States*, 342 F. 2d 894 (C.A.D.C., 1964) (Preliminary hearing before indictment).

II. Deprivation of Fair Trial—Because of the Suppression of the Testimony of a Vital Defense Witness by a Government Witness Acting in Connivance With or at Least the Acquiescence of, United States Marshals.

The suppression of the testimony of Witness Simpson, who was silenced by Partin in the presence of U. S. Marshals, was vital to the defense. If he had testified he could have told the motivation for Partin's testimony as well as cast doubt, because of Partin's addiction to narcotics, upon his reliability as a witness. The facts to which he would have testified are detailed in the Statement, pp. 21-24, infra.

The Court below agreed with the Trial Court that the petitioners were not entitled to a hearing on the Simpson allegations because the evidence was "cumulative impeaching" evidence.

The testimony of Simpson, if true, would have proved that Partin was a dope addict within the period from October to December 1962, during which the alleged criminal acts occurred and which Partin had narrated. Simpson, Partin's constant companion saw the needles, the syringes, the puncture marks, and heard Partin's admissions of addiction.

The decision of the Court below is in conflict with principles of law enunciated by this Court in analogous circumstances.

The intentional suppression of evidence is a denial of due process. *Brady* v. *State of Maryland,* 373 U.S. 83, 87; *Napue* v. *Illinois,* 360 U.S. 264, 269.

Just as failure of police to reveal material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld, so is suppression of evidence, and it should

make no difference if the withholding or suppression is by officials other than the prosecutor. The marshals are also part of the Government, and the taint on the trial is no less if they, rather than the U. S. Attorney, were guilty of non-disclosure or suppression. *Pyle* v. *Kansas,* 317 U.S. 213; *United States* v. *Lawrenson,* 298 F. 2d 880, 888 (4th Cir.); *Curran* v. *State of Del.,* 259 F. 2d 707 (3d Cir.). See also *Fahy* v. *Connecticut,* 375 U.S. 85. Here, where evidence was suppressed which had a direct bearing upon the credibility of the only material witness against Petitioner Hoffa, and could reasonably have weakened or overcome the testimony adverse to him, there should be no speculation that the undisclosed evidence might not have influenced the fact finder.

Where false testimony is given by a government witness with the knowledge of the prosecution, it is no answer to say that the testimony sought was only of an impeaching nature. This Court rejected such an argument. *Napue* v. *Illinois, supra.*

The principle in *Napue* should be equally applicable where there is active participation or at the very least acquiescence by officers of the court or the executive branch of the government, while its paid informer conceals witnesses and suppresses testimony which would be favorable to defendant.

The denial of a hearing on the motion was contrary to the fixed policy of the Courts to keep unpolluted the waters of justice. The denial of a hearing on similar charges was held to be reversible error in *U. S.* v. *Shotwell Mfg. Co.,* 355 U.S. 233, 241; *Mesarosh* v. *U. S.,* 352 U.S. 1, 14; and *Communist Party of U. S.* v. *Subversive Activities Control Board,* 351 U.S. 115.

The acts alleged, if true, impugn the administration of criminal justice; affect the public interest; the integrity of the record and the integrity of public officers. In the exercise of its supervisory jurisdiction over Federal Courts review on this point is appropriate.

CONCLUSION

For all of the reasons advanced, the petition should be granted.

Respectfully submitted,

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